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No. 07-841

Supreme Court, U.S.
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In The
Supreme Court of the United States

MELISSA AMSCHWAND,

Petitioner,

v.

SPHERION CORPORATION, individually and as plan administrator; TRUSTEES OF THE INTERIM HEALTH BENEFITS TRUST GROUP LIFE PLAN; and GROUP LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE PLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

RANDALL A. CONSTANTINE
Counsel of Record
MAZURSKY CONSTANTINE LLC
3424 PEACHTREE ROAD
SUITE 2400, MONARCH TOWER
ATLANTA, GA 30326-1118
404.888.8877
404.926.2977 (facsimile)
RConstantine@MCBenefitsLaw.com
Counsel for Respondents

January 28, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1) Should this Court review the Fifth Circuit's holding—which followed the precedent of this Court and every other Circuit—that money damages, in the form of monetary life insurance benefits under a group life insurance contract, are not "appropriate equitable relief" and are therefore not recoverable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents show that the stock of Respondent Spherion Corporation is publicly traded under the symbol SFN. No publicly traded shareholder owns more than 10% of the outstanding stock of Respondent Spherion Corporation.

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INTRODUCTION

This Court has repeatedly made it clear that not all types of relief are available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3); only "appropriate equitable relief" may be entered. Money damages of the sort sought by Petitioner are a classic form of legal (not equitable) relief and cannot be awarded under 502(a)(3).[1]

Petitioner argues that the rule is different in claims against fiduciaries. Neither the statute nor this Court (nor any other court for that matter) recognizes such a distinction. The dispositive issue for analysis is the nature of the remedy, not the parties to the lawsuit. The rule urged by Petitioner—that make-whole money damages may be awarded if the defendant is a fiduciary—ignores the strictures of 502(a)(3), which have been expressly recognized and enforced by this Court.

Petitioner argues further that a make-whole remedy could be entered by a court in equity against a trustee, even if the resulting money damages remedy was legal (not equitable) in nature, provided the "special conditions attached by equity are satisfied" (Petition at 8). Even if that were true under 502(a)(3), which the Respondents dispute, what Petitioner seeks here is not equitable make-whole. At most courts in

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[1] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is discussed extensively in this brief. To avoid the awkward duplication of the entire parallel citation every time the statute is cited, Respondents will refer simply to "502(a)(3)."

equity had the power to require that a trustee make-whole a trust corpus charged to the trustee's care (what the Petitioner refers to as "maladministration of a trust," Petition at 11). That remedy is provided by ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), so there is no need to provide the remedy again under 502(a)(3).

Further, that is not the remedy Petitioner seeks here. Petitioner does not seek to redress damage to a trust. Instead, she seeks traditional legal relief in the form of contract damages, representing the moneys she claims as benefits under the various group life insurance contracts. Petitioner has already been made whole: all premiums were refunded. Now she seeks something more than and different from make-whole: she seeks consequential money damages.

STATEMENT OF THE CASE

Petitioner filed her original complaint against Spherion Corporation, several group life insurance contracts, and an insurance company. At that time, Petitioner sought money damages (life insurance benefits) under an unjust enrichment theory, pursuant to a request for an injunction, and under a breach of contract theory.

In the ensuing two years, Petitioner filed six additional amended complaints. Through the course of these amendments, certain claims changed, and Petitioner added and subtracted various parties from the lawsuit. One thing never changed, however: the relief she sought. Then and now, Petitioner seeks to recover money damages, namely, the benefits she claims under the group life insurance contracts.

This matter was decided by the trial court on summary judgment on a very narrow legal issue: whether the relief sought by Petitioner could be awarded under 502(a)(3). The facts urged by Petitioner are not material to this legal issue, and the trial court did not make findings of fact. Specifically, the trial court did not make a finding that the Respondents were fiduciaries or that any of the Respondents breached any fiduciary duty to Petitioner, nor did the trial court determine that the damages Petitioner claims (the life insurance benefits) were proximately caused by Respondents' alleged fiduciary violations.

The Respondents take issue with many of the facts outlined by Petitioner.[2] Further, Petitioner's statement of facts is incomplete. Those additional facts are not relevant to this appeal, however. For this reason, although the Respondents do not concede or concur with Petitioner's statement of facts, the Respondents will not outline all of the other facts that would be relevant in the event this matter were tried on the merits.

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[2] For example, Petitioner argues that "[i]t is undisputed that had Mr. Amschwand been aware of the Active Work Rule he could and would have complied with it." (Petition at 3). At the time in question, Mr. Amschwand was on permanent and total disability. Mr. Amschwand could not have complied with the Active Work Rule because he was not medically fit to return to work. Further, he had stated in disability claim papers that he was totally and permanently disabled and therefore unable to work. Petitioner's statement is not "undisputed."

REASONS TO DENY THE WRIT PETITION

I. There is no split in the Circuits or other disagreement regarding the law governing this action.

The law governing the action below is well settled, both by this Court and by decisions in almost every Circuit. There is no split in the Circuits, and there is no disagreement in the lower Courts regarding the governing law. .

The Fifth Circuit expressly recognized this in its opinion:

- "Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 . . . (2002), we must deny relief."

- "Amschwand's proposed distinction among defendants has been rejected by many of our sister circuits. There is no textual argument for drawing this distinction under § 502(a)(3)."

- "[W]e are obliged to follow the Supreme Court's decision in *Great-West* and deny § 502(a)(3) relief."

Amschwand v. Spherion Corp., 505 F.3d 342, 343, 347, 348 (5th Cir. 2007).

II. The law governing the instant action — as previously articulated by this Court — is clear and requires no refinement or explanation.

A. *Mertens* does not permit make-whole relief against a fiduciary under 502(a)(3).

In *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), participants sought money damages from the plan's actuaries in order to recoup benefits they lost due to the actuaries' participation in an alleged fiduciary breach. *Id.* at 250. Although the participants attempted to characterize the claim as equitable under 502(a)(3), this Court recognized that the plaintiffs were not seeking "a remedy traditionally viewed as 'equitable,' such as injunction or restitution." *Id.* at 255. To the contrary, they were seeking "nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Id.* (emphasis in original). This Court concluded that "[m]oney damages are, of course, the classic form of *legal* relief," which is not available under 502(a)(3). *Id.* (emphasis in original).

The participants in *Mertens* argued that the Court's "reading of 'equitable relief' fails to acknowledge ERISA's roots in the common law of trusts." *Id.* (citation omitted). The Solicitor General argued further that since courts of equity could award all types of relief to beneficiaries in an action resulting from a breach of fiduciary duty, all such relief was by definition equitable, *i.e.*, relief entered by a court of equity. *Id.* at 256.

This Court rejected the argument. The Court acknowledged that "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* (citations omitted). The Court acknowledged further that "money damages were available in those courts against the trustee." *Id.* (citations omitted). The Court rejected the argument, however, that all such remedies were therefore equitable merely because they could be imposed by a court of equity:

> "[W]e think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*. We will not read the statute to render the modifier superfluous."

Id. at 257-58 (emphasis in original).

Mertens did not turn upon the identity of the defendant. *Mertens* expressly rejected the argument that the result should turn upon whether the claim could have been brought or the relief could have been imposed in a court of equity in the days of the divided bench.

The sole issue for analysis is the nature of the remedy. The *Mertens* plaintiffs sought to benefit the plan; Petitioner seeks a personal recovery. The remedy sought by Petitioner is otherwise indistinguishable from the remedy sought (and

rejected) in *Mertens*: Petitioner seeks money damages — life insurance benefits under the group life insurance contracts.

B. Petitioner cannot satisfy the two prong test articulated in *Great-West*.

Petitioner ignores the two step test articulated in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The Court outlined a two (not one) part test: "whether [a remedy] is legal or equitable depends on 'the basis for [the plaintiff's] claim' **AND** the nature of the underlying remedies sought." *Id.* at 213 (emphasis added). Petitioner would have to satisfy **BOTH** parts of the test in order to recover under 502(a)(3). *Id.*; *accord Sereboff v. Mid Atl. Med. Serv., Inc.*, 547 U.S. 356, 126 S. Ct. 1869, 1874 (2006).

Petitioner cannot satisfy either prong of the test. The nature of her underlying claim is breach of contract. Specifically, as demonstrated in her complaint and six amendments, throughout this lawsuit she has sought contract damages under the various group life insurance contracts and against the various group life insurance carriers. The nature of the remedy sought is likewise legal, not equitable. Petitioner seeks money damages, and "[m]oney damages are, of course, the classic form of *legal* relief." *Mertens*, 508 U.S. at 255. Since both the underlying action and the remedy sought are legal, not equitable, Petitioner cannot recover under 502(a)(3).

C. The alternative remedial framework urged by Petitioner violates the strictures of *Mertens* and *Great-West*.

Petitioner seeks to avoid the prior rulings of this Court by arguing that the remedy she seeks may be considered equitable "if law and equity attach different conditions to the remedy and the special conditions attached by equity are satisfied." (Petition at 8). Petitioner fails to specify any such special conditions and fails to demonstrate how such conditions have any roots in the remedies typically available at equity. Further, Petitioner applies its newly constructed framework in a manner that turns *Great-West* on its head.

The only "conditions" identified by Petitioner are that monetary relief should be available "to make whole damage to a beneficiary arising out of the maladministration of a trust, that is, out of the trustee's breach of fiduciary duties, an equitable remedy occasionally within the expanding jurisdiction of the law courts, but still an *equitable* remedy." (Petition at 11). Petitioner is arguing that monetary relief, or presumably any other remedy, is available to make whole a beneficiary in a suit for breach of fiduciary duty. This is precisely the argument that was rejected in *Mertens*, 508 U.S. at 257-58.

Petitioner mistakenly assumes that "maladministration of a trust" is synonymous with "breach of fiduciary duties." As discussed in the next section of this brief, both ERISA and courts at equity provide remedies for maladministration of trusts. *Mertens* makes clear however, that those same

remedies do not extend to any and all actions for breach of fiduciary duty.

Petitioner suggests her proposed framework does no violence to *Mertens* because her focus is not whether "the monetary relief she seeks would be available in *some* case," but is instead whether "it would be available in *her* case, if brought in an equity court in the days of the divided bench." (Petition at 12). *Mertens*, however, stated precisely the opposite: the focus is not on whether the remedy might have been available to a particular beneficiary in the days of the divided bench, but instead on whether the remedy was *typically* available. *Id.*; *Great-West*, 534 U.S. at 219.

III. The supposed make-whole remedy sought by Petitioner was not available even in courts of equity.

A. The remedy sought by Petitioner is not equitable make-whole as that limited concept was recognized in the days of the divided bench.

Petitioner argues that ERISA is based upon historical trust law, that trust beneficiaries could obtain make-whole relief against a trustee in a court of equity, and that she is therefore entitled to make-whole relief here. The flaw in this argument is Petitioner's assumption that "maladministration of a trust" is the equivalent of a "trustee's breach of fiduciary duties," which of course it is not. (Petition at 11).

The historical make-whole remedy on which Petitioner relies was a duty to make the trust corpus whole, and thus only indirectly to make the trust beneficiaries whole, in the event the trustee mismanaged (or "maladministered") the trust. In the absence of some fiduciary breach harming the trust corpus, the trust beneficiaries did not have a separate make-whole remedy against the trustee personally.

There is no suggestion here that the Respondents mismanaged trust assets or caused any loss to trust corpus. There is not even a trust, and Petitioner is certainly not the beneficiary of any trust. Therefore there can be no make-whole. Thus, even if make-whole relief were available under 502(a)(3), which it is not, Petitioner would still not be entitled to recover money damages for the benefits she claims under the group life insurance contracts.

Petitioner argues that money damages can be awarded under 502(a)(3) "to cure the maladministration of a trust." (Petition at 9). In the event of damages to a trust caused by maladministration, ERISA already provides a remedy under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Likewise, ERISA already provides a remedy under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), in the event a "trustee is under a duty to pay money immediately and unconditionally." (Petition at 10). No catchall remedy under 502(a)(3) is required or permitted.

B. Petitioner seeks more than make-whole.

Petitioner admits that all premiums were refunded. Thus, Petitioner has already been made-whole. Further, she has no claim for equitable restitution. Now, Petitioner wants "make-whole plus some more." She wants what is essentially legal restitution, which is not available under 502(a)(3).

IV. The Fifth Circuit's ruling was required by the express statutory language and requirements of 502(a)(3).

Petitioner argues that 502(a)(3) offers a broader array of relief against fiduciary defendants than against non-fiduciary defendants. The express language of the statute on its face demonstrates the fallacy of this argument, as the Fifth Circuit itself recognized. *Amschwand*, 505 F.3d at 347.

ERISA § 502(a)(3) provides that a

> "civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

Thus, 502(a)(3) on its face defines who may bring an action. In contrast, it nowhere provides that the

nature of the remedy it affords depends on the status or identity of the defendant.

By contrast, the same is not true of other provisions of ERISA. For example, ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides relief solely against fiduciary defendants; it provides no remedy whatsoever against non-fiduciary defendants. The statute on its face makes a clear distinction between the remedies available against a fiduciary versus the remedies available against non-fiduciaries (unlike 502(a)(3)).

Expanding the scope of equitable relief under 502(a)(3) with respect to claims against fiduciaries would also put 502(a)(3) at odds with other provisions of ERISA that recognize the distinction between legal and equitable relief. This Court addressed this precise issue in *Mertens*, 508 U.S. at 257-58. In *Mertens*, this Court rejected the very argument now urged by Petitioner that the range of "equitable relief" under 502(a)(3) against a fiduciary is broader than the range of such relief against a non-fiduciary. The *Mertens* Court recognized that adopting the approach urged by Petitioner

> "would also require us either to give the term [equitable relief] a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between 'equitable' and 'remedial' relief in § 409(a), [29 U.S.C. § 1109(a),] and between 'equitable' and 'legal' relief in the very same section of ERISA, see [§ 502(g)(2)(E),] 29 U.S.C. § 1132(g)(2)(E); in the same subchapter of ERISA, see [§ 104(a)(5)(C), 29 U.S.C.] § 1024(a)(5)(C); and

> in the ERISA subchapter dealing with the PBGC, see [§§ 4003(e)(1), 4301(a)(1), 29 U.S.C.] §§ 1303(e)(1), 1451(a)(1). Neither option is acceptable."

Id. at 258-59.

In summary, in drafting 502(a)(3), Congress chose not to make a distinction between relief available against a fiduciary versus relief available against a non-fiduciary, in contrast to other provisions of ERISA. Further, in 502(a)(3) Congress conditioned relief based upon the identity of the plaintiff, but did not condition relief based upon the identity of the defendants. The "carefully integrated civil enforcement provision found in ERISA § 502(a) of the statute as finally enacted . . . provide[s] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

V. This Court's decision to grant certiorari in *LaRue* is not relevant to, and provides no basis for granting, the instant petition.

Petitioner argues that this Court's decision to grant certiorari in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 127 S. Ct. 2971 (2007), suggests that the Court desires to "address the availability of make-whole relief under [502(a)(3)]." (Petition at 12-13). The focus of *LaRue* was an issue involving remedies under ERISA

§ 502(a)(2), 29 U.S.C. § 1132(a)(2).[3] As demonstrated during oral argument, the case may also impact the scope of remedies under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The remedy issue under 502(a)(3) was at best a secondary issue thrown in as an afterthought.

The remedy issue under 502(a)(3) is well settled in this Court. The Court's granting certiorari in *LaRue* does not imply that the Court has any interest in revisiting the issue yet again.

CONCLUSION

Petitioner seeks money damages. In order to avoid the prior holdings of this Court, Petitioner argues that she seeks equitable make-whole relief, not legal make-whole relief. In support of this position, however, Petitioner falls back on the arguments urged and rejected as early as *Mertens*. The mere fact that Petitioner seeks a remedy against a fiduciary is not sufficient to transform a legal remedy to one "typically available in equity."

The Fifth Circuit correctly applied the teachings of this Court. Respondents respectfully submit that this Court should deny the petition for a writ of certiorari.

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[3] Petitioners inaccurately state that the first question presented in *LaRue* was whether "502(a)(3) [sic] of ERISA permit[ted] a participant to bring an action to recover losses . . . ." (Petition at 12-13).

Respectfully submitted,

Randall A. Constantine
Counsel of Record
Mazursky Constantine LLC
3424 Peachtree Road
Suite 2400, Monarch Tower
Atlanta, Georgia 30326-1118
404.888.8877
404.926.2977 (facsimile)
RConstantine@MCBenefitsLaw.com

Counsel for Respondents